UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

DIMARZIO, INC.

and Case No. 29-CA-21206

AUDREY JACQUES, AN INDIVIDUAL

Marcia E. Adams, Esq., Brooklyn, NY, for the General Counsel. Gina Accordino, Esq. (Ettelman & Hochheiser, P.C.,) Garden City, NY, for the Respondent.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge filed on July 24, 1997 by Audrey Jacques, An Individual (Jacques), a complaint was issued on June 13, 2002 against DiMarzio, Inc. (Respondent).

The complaint alleges essentially that in October,1996, Jacques filed an unfair labor practice charge against the Respondent which was dismissed in January, 1997, and that thereafter in May, 1997, Jacques filed a complaint in U.S. District Court against the Respondent pursuant to the Americans with Disabilities Act. In July, 1997, the Respondent answered the complaint and filed a counterclaim. The counterclaim was dismissed by the court.

Specifically, with regard to the allegations of unfair labor practices, this complaint alleges that the Respondent's counterclaim was baseless as not supported by facts or law, was in retaliation for Jacques' attempts to seek redress through the Board's processes., and was filed in violation of Section 8(a)(1) and (4) of the Act because Jacques filed the charge in October, 1996.

The Respondent's answer denied the material allegations of the complaint, and asserted certain affirmative defenses which will be discussed below. On August 12, 2003, a hearing was held before me in Brooklyn, New York.

Upon the evidence presented in this proceeding, and after consideration of the letterbriefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a domestic corporation having its principal office and place of business at 1388 Richmond Terrace, Staten Island, New York, has been engaged in the operation of an

electronics manufacturing plant.¹ During the past year, the Respondent purchased and received at its facility, goods, supplies and materials valued in excess of \$50,000 from enterprises located within New York State which entities, in turn, received the goods, supplies and materials directly from points outside New York State. The Respondent admits, and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

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1. Background

Jacques was employed as an electronic assembly worker from 1989 to September 11, 1996.

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On October 23, 1996, Jacques filed a charge in Case No. 29-CA-20418 against the Respondent which alleged that on about September 11, 1996, it discharged her because she engaged in protected and concerted activities. On January 15, 1997, the Regional Director found that there was insufficient evidence of any violation of the Act and dismissed the charge. On March 10, 1997, the General Counsel denied her appeal of the dismissal.

On April 16, 1997, Jacques filed a charge with the Equal Employment Opportunity Commission (EEOC) which alleged that she was discharged in September, 1996 after she told the Respondent that she suffered from a disability. The charge stated that, thereafter, the Respondent began to harass and intimidate her and deny her equal terms and conditions in employment, and "constructed" her termination based on her condition. The charge concluded that she was discharged "after being cornered by Respondent with a false accusation."

On May 6, 1997, the EEOC issued a Notice of Right to Sue. On May 20, 1997, Jacques filed suit in U.S. District Court for the Eastern District of New York in Case No. 97-CV-2884 against the Respondent, alleging that it failed to accommodate her disability consisting of "Bi Polar Depression", accorded her unequal terms and conditions in her employment, and discharged her in violation of the Americans with Disabilities Act (ADA). Jacques' statement of facts, set forth in the lawsuit, stated that the Respondent, being aware of her condition, subjected her to "cruel and malicious ideations about my condition," and that the Respondent intimidated and harassed her, and used her disability to "target and antagonize, to provoke emotional responses and to then discipline." She further stated that the Respondent used her co-worker to make a "false and defamatory accusation against me," and one day before her discharge, it "cornered and emotionally assaulted me." She concluded that she was "forced to endure the human indignities of an insensitive and inhumane work environment spawned by prejudice," and that the Respondent "set out to deliberately cause me mental harm and anguish."

2. The Respondent's Answer and Counterclaim

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On July 7, 1997, the Respondent filed its answer to the federal lawsuit. It stated that Jacques was discharged for cause, including her "continued and numerous confrontations with

¹ This characterization of the Respondent's operations is as described in Jacques' complaint in federal court, received in evidence as a Joint Exhibit. The Respondent denied the complaint's allegation that it was engaged in the business of assembling electric guitars.

and harassment of co-workers and supervisors, as well as her use of racial and ethnic slurs regarding her co-workers." The Respondent noted that it was not aware that Jacques suffered from any disability.

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The Respondent's counterclaim stated that following Jacques' discharge, she filed a "frivolous, false and fraudulent claim ... without basis in fact or law against defendant with the National Labor Relations Board" in Case No. 29-CA-20418 accusing it of terminating her because she engaged in protected, concerted activities. The Respondent characterized the filing of the charge as "a willful and malicious act done by plaintiff for the sole and exclusive purpose of harassing defendant, impugning defendant's reputation, creating employee unrest, interfering with employee morale and interfering with and damaging defendant's business," causing its business operations and employee morale to be "negatively impacted." The Respondent asserted that "as a result of the malicious and intentional acts of plaintiff as aforesaid, defendant has been damaged and continues to be damaged, in an amount to be proven at trial but believed will exceed \$500,000." The Respondent demanded judgment pursuant to its counterclaim for that sum.

Jacques filed the instant charge on July 24, 1997 alleging that the Respondent filed a lawsuit against her because she filed the charge in Case No. 29-CA-20418.

On August 4, 1998, the Respondent filed an amended answer to Jacques' complaint, in which it reasserted the counterclaim set forth above, but reduced the amount of damages sought to \$50,000.

In May, 2002, District Judge Frederic Block denied the Respondent's motion for summary judgment on Jacques' federal claim under the ADA. *Jacques v. DiMarzio*, 200 F. Supp. 2d 151, 162 (E.D.N.Y. 2002). In that decision, Judge Block stated that he was "deeply troubled by DiMarzio's \$500,000 counterclaim, which appears to be nothing more than a naked form of retaliation against Jacques, a vulnerable plaintiff who suffers from a significant mental impairment, for filing her lawsuit. She should not be subjected to *in terrorem* tactics." Judge Block gave the Respondent thirty days in which to submit legal authority and evidence to justify its counterclaim, if it could, and to explain why Rule 11 sanctions should not be imposed.

On August 23, 2002, Judge Block issued a Memorandum and Order in which he discussed the Respondent's attempt to justify its counterclaim. Judge Block noted that the Respondent's counsel asserted that its counterclaim "pled colorable claims sounding in abuse of process, malicious prosecution and *prima facie* tort under New York Law." The Respondent's counsel also argued that sanctions against him were not appropriate because, inter alia, the counterclaim "seeks damages for Jacques' repeated actions before numerous administrative agencies, there is evidence of improper motive for Jacques' [filing of] those actions, and Jacques' actions disrupted DiMarzio's business."

Judge Block held that the counterclaim was "frivolous" and "is utterly devoid of factual allegations to raise a colorable claim under New York law for abuse of process, malicious prosecution or *prima facie* tort." He dismissed the counterclaim, stating that the defendant's "cryptic, generalized, and ill-defined conclusory claim of harassment cannot serve as a substitute for pleading the requisite elements of these causes of action."

² The Respondent also asserted that the filing of charges with the EEOC and the NYS Division of Human Rights were similarly frivolously and maliciously done.

Judge Block also imposed Rule 11 sanctions against the Respondent's counsel in the amount of \$1,000.3 Rule 11 requires that an attorney represent that as to documents filed with the court, that (a) the legal claims are warranted under existing law or pursuant to a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law and (b) the allegations and factual contentions have evidentiary support or will likely have evidentiary support after a reasonable opportunity for discovery. Judge Block stated that the frivolous nature of the counterclaim "is bolstered by defendant's counsel's failure to offer any evidence to support defendant's claimed damages or any factual bases for his other conclusory assertions." Judge Block noted that Rule 11 is violated "where it is patently clear that a claim has absolutely no chance of success."

Judge Block further stated that "defendant's counsel's attempt to justify the counterclaim by arguing that it was warranted by plaintiff's 'repeated actions before numerous administrative agencies' reinforces the frivolousness of the counterclaim. The two administrative claims hardly bespeak of 'repeated actions.' To the contrary, they simply served as predicates for the subject litigation." Judge Block noted that "as for her state whistle blower claim, which may not require exhaustion, plaintiff cannot be faulted for seeking relief before the NLRB as a means to avoid litigation; moreover, it is not at all uncommon for a claimant to be unsuccessful at the administrative level and, as in the present case, to be successful at the judicial level. That plaintiff was not successful in her administrative pursuits should not chill her right to come to court for fear of being subjected to a retaliatory counterclaim." Judge Block also noted that although the damages sought was reduced from \$500,000 to \$50,000, "the *in terrorem* effect of the initial half million dollars lingered for about a year."

Finally, Judge Block stated:

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In sum, given the plaintiff's labile emotional condition and her initial pro se status, the factually unsupported, conclusory lay nature of the counterclaim can only realistically be viewed, as suspected by the Court in its prior decision, as a bad faith retaliatory *in terrorem* tactic against the plaintiff for bringing her claims to court. This conduct constitutes the "type of abuse of the adversary system that Rule 11 was designed to guard against." The Court reiterates its admonition to the practicing bar "against asserting baseless, retaliatory counterclaims." *Jacques*, 200 F.Supp. 2d at 163.

Analysis and Discussion

A. Legal Principles

This complaint alleges that the Respondent's counterclaim was baseless, not supported by facts or law, and was in retaliation for Jacques' attempts to seek redress through the Board's processes. The complaint further alleges that the Respondent filed the counterclaim because Jacques filed a charge in October, 1996, and that the Respondent's filing of the counterclaim violated Section 8(a)(1) and (4) of the Act.

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 742, 744 (1983), the Supreme Court held that it was an unfair labor practice for an employer to prosecute a baseless lawsuit

³ The Respondent's attorney paid the sanction.

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with the intent of retaliating against an employee for the exercise of rights protected by Section 7 of the Act. The Court held that if the litigation was no longer pending, and the lawsuit is "withdrawn or is otherwise shown to be without merit" and the employer did not prevail, the Board may proceed to resolve whether the employer acted with a retaliatory motive in filing the lawsuit. 461 U.S. at 747.

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The Board has interpreted *Bill Johnson's* to hold that if the plaintiff's lawsuit has ended and the plaintiff has not prevailed, its lawsuit is deemed meritless, and the Board's inquiry then turns to resolving whether the plaintiff acted with a retaliatory motive in filing the lawsuit. *Operating Engineers Local 520 (Alberici Construction)*, 309 NLRB 1199, 1200 (1992).

This principle was limited in *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 122 S. Ct. 2390 (2002), in which the Court held that the Board cannot deem unlawful under Section 8(a)(1) of the Act "all reasonably based but unsuccessful suits filed with a retaliatory motive." The Court held that the First Amendment protects petitioning, which includes the right to sue. However, "sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition.... Baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's*, at 743; *BE & K*, 122 S.Ct. at 2396.

The question therefore becomes whether the Respondent's counterclaim was reasonably based, involving "genuine grievances" or which advances "some First Amendment interests", or brought to stop conduct it "reasonably believes is illegal," *BE & K*, 122 S.Ct. at 2399-2340, or if it raised "genuine issues of material fact" or was not "frivolous." *Bill Johnson*'s, above, at 746-747. If not reasonably based, the question becomes whether the counterclaim was brought for a retaliatory purpose.

A threshold question is whether the principles enunciated in *Bill Johnson's* and *BE & K*, where independent lawsuits were brought by the employer, apply here, where the Respondent filed a counterclaim in answer to a lawsuit filed by Jacques. I find that they do. "A counterclaim is the functional equivalent of a complaint...." *Miller v. U.S.*, 150 F.3rd 770, 772 (7th Cir. 1998). "A setoff or counterclaim is, in its nature and effect, like an independent action by the defendant against the plaintiff, and as a general rule, a party cannot avail himself of a claim as a setoff or counterclaim unless it is a legally subsisting cause of action upon which he could maintain an independent action. *Flying Tiger Line, Inc. v. U.S.*, 170 F.Supp. 422, 425 (Ct. of Claims 1959).

1. The Counterclaim Was Not Reasonably Based

The Respondent's counterclaim stated that Jacques filed a charge with the Board "for the sole and exclusive purpose of harassing defendant, impugning defendant's reputation, creating employee unrest, interfering with employee morale and interfering with and damaging defendant's business," causing its business operations and employee morale to be "negatively impacted."

Judge Block dismissed the counterclaim, finding that it was "frivolous", "baseless", "conclusory", "utterly devoid of factual allegations to raise a colorable claim", did not even plead the "requisite elements of these causes of action" and as to which no evidence was offered to support any of the Respondent's claimed damages or any factual bases for the other conclusory assertions. Judge Block also termed the counterclaim an "abuse of the adversary system" sanctionable under Rule 11 of the Federal Rules of Civil Procedure. In imposing sanctions under Rule 11, Judge Block noted that Rule 11 is violated "where it is patently clear that a claim has absolutely no chance of success." Accordingly, the Respondent could not have reasonably believed, at the time it filed the counterclaim, that Jacques' conduct in filing the charge was

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actionable.

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Thus, "the Respondent's lawsuit was found not just to have lacked merit – that would be a charitable characterization of its outcome. The lawsuit's claims did not even get to a jury ... because [the Respondent] was unable to plead a legally cognizable cause of action, notwithstanding that the district court provided the Respondent [two] opportunities to do so." *Petrochem Insulation, Inc.*, 330 NLRB 47, 50 (1999).

Accordingly, I cannot find that the counterclaim was reasonably based. Rather, it constituted baseless, "sham litigation" not involving a bona fide grievance, nor raising any genuine issues of material fact.

2. The Counterclaim Was Retaliatory

It is clear that the counterclaim was retaliatory and instituted because Jacques filed the charge in Case No. 29-CA-20418. The retaliatory nature of the counterclaim is set forth in the document itself. The counterclaim states that Jacques willfully and maliciously filed the charge in order to harass the Respondent, impugn its reputation, create employee unrest, interfere with employee morale and interfere with and damage the Respondent's business. The counterclaim added that as a result of Jacques' "malicious and intentional acts as aforesaid" which clearly referred to her filing the charge, the Respondent was damaged in an amount believed to exceed \$500,000.

Accordingly, it is clear that the Respondent sought to retaliate against Jacques for filing the charge. It did so by filing the counterclaim against her, and demanding \$500,000 in damages. I therefore find that by filing the counterclaim against Jacques, the Respondent sought to interfere with her right to file a charge, and to discourage other employees from filing charges. *Garage Management Corp.*, 334 NLRB 940 (2001).

"A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation." The chilling effect of a lawsuit is "multiplied where the complaint seeks damages in addition to injunctive relief." *Bill Johnson's*, at 740-741. A retaliatory motive may be inferred from the amount of damages, \$500,000, sought by the Respondent, as compensation for its alleged losses. Although that amount was lowered, one year later, to \$50,000, the demand for this excessive amount of damages is evidence of a retaliatory motive, *Petrochem,* above, at 51, and, as stated by Judge Block, the *in terrorem* effect of the original half million dollar demand "lingered for about a year."

I therefore find that the Respondent violated Section 8(a)(1) and (4) in filing its counterclaim against Jacques.

3. The Respondent's Affirmative Defenses

In its answer to this complaint, the Respondent denies that Jacques engaged in any protected or concerted activities inasmuch as she was lawfully discharged prior to the time she filed the charge. The Respondent further argues that since she had been lawfully discharged before she filed the charge, it did not discriminate against her with respect to her employment.

The act of filing a charge is protected activity under the Act. *Teamsters Local 413* (*Refiners Transport*), 316 NLRB 343, 351 (1995). Moreover, a charge may be filed by any person, the term "person" being broadly defined under Section 102.9 of the Board's Rules and Regulations. Accordingly, it does not matter that, at the time she filed the charge, she was no

longer employed by the Respondent, or even that her discharge had not been found to be unlawful under the National Labor Relations Act.

The violation established here is that the Respondent retaliated against Jacques for exercising her right, as an employee or a non-employee, to file a charge. The Board found a similar violation in an employer's refusal to rehire an employee who had quit and then filed a charge, which was dismissed. *Freightway Corp.*, 299 NLRB 531, 532 (1990). Indeed, *BE & K*, above, involved a situation where a retaliatory lawsuit was brought against a union. Although that case involved a violation of Section 8(a)(1) and not 8(a)(4), the principles are the same. The difference is that in a case involving an employee, a job-related remedy, such as reinstatement, may be awarded. But the principles concerning whether a violation of the Act has been committed remain the same. "The approach to Section 8(a)(4) generally has been a liberal one in order to fully effectuate the section's remedial purpose." *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972).

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Conclusions of Law

1. By filing a baseless counterclaim against Audrey Jacques on about July 7, 1997, which was not supported by facts or law, and which was in retaliation for Jacques' attempts to seek redress through the Board's processes, and because Jacques filed a charge in Case No. 29-CA-20418, the Respondent violated Section 8(a)(1) and (4) of the Act.

Remedy

25 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as the counterclaim found to have violated the Act has been dismissed by the court, the Respondent will not be ordered to withdraw it.

The traditional remedy, which will be applied here, awarded by the Board in cases where an employer has filed a baseless, retaliatory lawsuit is an order requiring the employer to reimburse the targeted employee for all legal and other expenses incurred in defending against the lawsuit, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835-836, fn. 10 (1991); *BE & K Construction Co.*, 329 NLRB 717 (1999).

The Respondent's brief asserts that Jacques is not entitled to any legal fees since (a) she was represented without charge by a free legal clinic, Brooklyn Legal Services (BLS) and (b) Judge Block has determined that BLS is entitled to an award of attorneys fees in the federal court action which "necessarily" includes fees incurred with respect to the counterclaim.

The determination of what legal and other expenses incurred in defending against the counterclaim should be paid by the Respondent will be left to the compliance stage of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Continued

ORDER

The Respondent, DiMarzio, Inc., Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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- (a) Filing a baseless lawsuit or counterclaim against employees in retaliation for their filing charges or giving testimony under the National Labor Relations Act.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Reimburse Audrey Jacques for all legal and other expenses incurred in the defense of the Respondent's counterclaims filed on July 7, 1997 and August 4, 1998, with interest.
- 20 (b) Within 14 days after service by the Region, post at its facility in Staten Island, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 7, 1997.
 - (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

35	Dated, Washington, D.C.	
40		Steven Davis Administrative Law Judge

Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(Title)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT file baseless lawsuits or counterclaims against employees in retaliation for their filing charges or giving testimony under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reimburse Audrey Jacques for all legal and other expenses incurred in the defense of our counterclaims filed on July 7, 1997 and August 4, 1998, with interest.

DIMARZIO, INC.

(Employer)

Dated By

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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26 Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104 (212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

(Representative)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.

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